Supreme Court, U.S.
FILED

No. 93-1164 JAN 10 1994

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IN THE

Supreme Court of the United States

October Term, 1993

THERESA A. LaPAGE and GREGORY KENT JENKINS, as Natural Parents and Limited Administratrices of the Goods, Chattels and Credits of ASHLEY MARIE JENKINS, Deceased, and THERESA A. LaPAGE, Individually,

Petitioners,

against

LYNNE Di COSTANZO, M.D., REUVEN LEVY, P.C. and ALICE HYDE MEMORIAL HOSPITAL,

Respondents.

APPEAL FROM THE APPELLATE DIVISION, THIRD DEPARTMENT, OF THE SUPREME COURT OF THE STATE OF NEW YORK

PETITION FOR WRIT OF CERTIORARI

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Question Presented For Review

Does the due process clause and the equal protection clause of the 14th Amendment of the United States Constitution give a full-term viable fetus the right to sue for malpractice, when this full-term child was not born alive but was alive eighteen minutes before its cesarean section delivery (when the malpractice claimed was a failure to promptly perform the cesarean section)?

List of All Parties to the Proceeding in the Court Whose Judment is Sought to be Reviewed.

The names of all of the parties to the proceeding in the Court whose Judgment is sought to be reviewed appear in the caption of the case.

The two corporate parties, the hospital and the doctor professional corporation, have no parent or subsidiary companies.

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PETITION FOR WRIT OF CERTIORARI

Official and Unofficial Reports of Opinions Delivered in the Case by Other Courts or Administrative Agencies.

Defendants moved in New York State Supreme Court for Summary Judgment in the above-captioned medical malpractice case dismissing Ashley Marie Jenkins' cause of action for wrongful death. See excerpts of Order in Appendix (A8-A9). This was granted. Upon appeal, the Appellate Division of the New York State Supreme Court, Third Judicial Department affirmed the lower Court Order on June 17, 1993. The Appellate Division Memorandum and Order appears in the Appendix at (A5-A7). An application was made to the New York State Court of Appeals for permission to appeal on Federal and State Constitutional Grounds. This application was denied on September 14, 1993 (A4). Subsequently, an application was made for permission to appeal to the New York State Court of Appeals and this was denied on December 15, 1993 (A1-2).

Statement of the Grounds on Which the Jurisdiction of this Court is Invoked.

(i) Decision of the Appellate Division, Third Judicial Department dated June 17, 1993.

(ii) Not Applicable.

(iii) Not Applicable.

(iv) The statutory provision believed to confer jurisdiction on this Court is Title 28 U.S. Code §1257(a); *Elks*

National Foundation v. Weber (1991), Ca. 9 Mont. 942 F2d 1480; *Mississippi Power and Light Co. v. Mississippi, et rel.*, 487 U.S. 354, 101 L.Ed.2d 322.

The Decision and Order sought to be reviewed is that of the Appellate Division of the New York State Supreme Court, Third Judicial Department, dated June 17, 1993, which was based upon the law of the State of New York as enunciated in *Endresz v. Friedberg, et al.*, 24 N.Y.2d 478 and *Tebbutt v. Virostek*, 65 N.Y.2d 931; 483 N.E.2d 1142. These Decisions hold that unless a child is born alive, even though it is a viable fetus at the time it sustained injury, it has no rights to sue, despite the fact that the delay in its cesarean section delivery amounted to medical malpractice. In fact, if a child survives the cesarean section by one second, it has a right to sue and if it dies as a result of the medical delay (which is the basis of the negligence) one second before the cesarean delivery, it has no right to sue.

Constitutional Provisions, Treaties Statutes, Ordinances and Regulations Involved.

United States Constitution, Fourteenth Amendment, Section 1:

Section 1. Citizens of the United States.

> "All *persons* born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; *nor* shall any State deprive any *person* of life, liberty, or property,

without due process of law; *nor* deny to any *person* within its jurisdiction the equal protection of the laws."

Endresz v. Friedberg, et al., 24 N.Y.2d 478

Tebbutt v. Virostek, 65 N.Y.2d 931; 483 N.E.2d 1142

Woods v. Lancet (1951), 303 N.Y. 349; 102 N.E.2d 691; 27 ALR2d 1250, written by Judge Cardoza

Estate Powers and Trust Law of the State of New York

§5-4.1. "Action by personal representative for wrongful act, neglect or default causing death of decedent.

The personal representative, duly appointed in this State or any other jurisdiction, of a decedent who is survived by distributees may maintain an action to recover damages for a wrongful act, neglect or default which caused the decedent's death against a person who would have been liable to the decedent by reason of such wrongful conduct if death had not ensued. Such an action must be commenced within two years after the decedent's death. When the distributees do not participate in the administration of the decedent's estate under a will appointing any executor who refuses to bring such action, the distributees are entitled to have an administrator appointed to prosecute the action for their benefit."

* * *

Statement of the Case.

Petitioners commenced an action against the Respondents for malpractice alleged to have occasioned the death of their daughter, Ashley Marie Jenkins, on February 9, 1989.

On the evening of February 9, 1989, Dr. Reuven Levy had been called by Respondent Lynne Di Costanzo, M.D. to assist in a Cesarean Section of the Petitioners' Intestate Ashley Marie Jenkins' mother Theresa A. LaPage. He assisted by retracting the tissues for the Respondent Lynne Di Costanzo, M.D. He opined that the baby was dead when born. The baby was given to the pediatrician, Ira M. Weissman, M.D., who examined the baby and indicated that there was no heartbeat and that the baby was dead.

The Operating Room Circulating Nurse, Don McKenzie, testified that he was in the Operating Room at 6:30 in the evening on February 9, 1989 with Scrub Nurse, Lucy Gillette, and with William McCarthy, the Nurse Anesthetist. He testified that they summoned Dr. Lynne Di Costanzo, Dr. Levy and Dr. Weissman.

The pediatrician and the doctors arrived at 6:35 p.m. He testified further at 6:37 p.m. the incision was made and that the anesthesia was administered at 6:35 p.m. He testified the delivery time was 6:43. He could observe no life in the baby at that time. He said that the cord was cut and the baby was placed in a sterile towel and was placed in a kriselman. He testified that Dr. Ira Weissman, the Pediatrician, used a stethoscope, listened for a heartbeat and intubated the baby. He testified further that the baby was pronounced dead at 7:00 o'clock, having been delivered at 6:43 p.m.

Tammy Lynn Reynolds testified that she was a Registered Nurse in Obstetrics on February 9, 1989 working the three to eleven thirty shift. She testified that the Petitioners' intestate's mother came into the hospital at five minutes after four in the afternoon on February 9, 1989. She testified that after the baby was born she weighed the baby and recorded the weight at seven pounds fourteen ounces (7# 14 ozs.). She testified that she took the baby's footprints, measured her, gave her a bath, put a t-shirt and a hat on her and wrapped her in a blanket. She testified that Dr. Weissman came into the Nursery and examined the baby before she did this. She further testified that she brought the baby to her mother.

Linda Marie Bouissey testified that she was the Evening Supervisor of the Respondent Alice Hyde Memorial Hospital on February 9, 1989 working from three in the afternoon to eleven thirty in the evening. She testified that she was paged to go to the Operating Room to assist Dr. Ira Weissman, the Pediatrician. She put an intravenous in the baby after the baby was born. She said Dr. Weissman was doing cardiac compressions on the baby, Will McCarthy was ambu bagging the baby and that Dr. Weissman pronounced the baby dead at 7:00 o'clock. She said that the baby was blue and limp.

Lucille Gillette testified that on February 9, 1989, she was an LPN having worked the shift from seven to three and that she was on-call for Emergency Room cases that evening. She was called in on this case and she was there and ready to start after 6:00 p.m. She said that Petitioners' Intestate's mother came into the Operating Room at 6:30 p.m. She said after the incision, Respondent Lynne Di Costanzo, M.D. pulled the baby's head out while Dr. Reuven

Levy was pushing down on the top part of the abdomen. She described the baby as "very flaccid". She said Respondent Lynne Di Costanzo, M.D. cut the cord which was around the baby's neck.

Dr. Ira Weissman the Pediatrician, testified that on February 9, 1989, according to his notes, the baby had a triple nuchal cord, which was very tight, wrapped around the neck three times and that the baby was covered with meconium both outside and in the oral cavity. He initiated CPR by intubating the baby, gave the baby oxygen and breathing for the baby with an ambu bag. Dr. Weissman further testified that the baby was born at 6:43 p.m. and intubated at 6:45 p.m. and pronounced dead at 7:00 o'clock. Dr. Weissman testified that he didn't hear a heart rate, breathing sounds or observe spontaneous movement. He testified that the baby's footprints were on the hospital chart.

William McCarthy testified that he was a Nurse Anesthetist working at the Respondent Alice Hyde Memorial Hospital on February 9, 1989. He administered the anesthesia and the baby was born through an incision in the uterus. He said that he saw that the baby had the cord wrapped around its neck several times.

Deborah Burrell Merrick testified that she was a *Registered Nurse* employed by the Respondent Alice Hyde Memorial Hospital on *February 9, 1989 working the three to eleven thirty shift. She said she was the nurse on duty when the Petitioners' Intestate's mother was admitted around ten minutes to four that afternoon.* She stayed with her on the Obstetrical Floor until she was brought into the Operating Room. *She says that at 5:45 p.m. the Respondent Lynne Di Costanzo, M.D., made a decision to do a cesarean section.*

She testified that Petitioners' Intestate's mother left the Obstetrical Floor to go to the Operating Room at 6:25 p.m. She says at that time there was a *fetal monitor in place that did not go downstairs to the Operating Room and that at 6:25 p.m. the fetal monitor was taken off the baby. She says that this fetal monitor was in place from the time of the rupture of the membranes (the breaking of the mother's water). The internal monitor was placed at 5:33 p.m. on the baby and was there until 6:25 p.m. and that at 6:25 p.m. the fetal heart was recording. This was thirty-five (35) minutes before the baby was pronounced dead, and, eighteen (18) minutes before the alleged stillborn delivery.*

The *cause of the infant's death was strangulation by the umbilical cord.* The strangulation was *caused by the delay in delivery.* The delay in delivery was negligence on the part of the health professionals. *Had the child been delivered timely, it would have been born alive. The child was alive within minutes of its actual cesarean delivery.*

The Courts below have held, in effect, that the Estate of Ashley Marie Jenkins has no cause of action since the child died within eighteen (18) minutes of her actual cesarean delivery.

This is Review of a State Court Judgment.

The same Federal questions that are raised here were raised in the New York State Supreme Court in opposition to the Motion for Summary Judgment on Appeal to the Appellate Division, Third Judicial Department and in the Application to the New York State Court of Appeals for review of the Appellate Division Decision on Constitutional

grounds. These questions were raised in the briefs and answers submitted to the State Courts. The following are excerpts of the raising of these questions:

See Appendix (A8-A16)

Argument Amplifying the Reasons Relied on for Allowance of the Writ.

The court-appointed representatives of the deceased, Ashley Marie Jenkins, by judicial fiat under the authority of the *Endresz* and *Tebbutt* cases, cited herein, are denied rights to sue accorded to a *person* who lives eighteen (18) minutes longer than she did. The medical professionals were responsible for her delayed birth. If the child were born alive, she would have an action. *Woods v. Lancet* (1951), 303 N.Y. 349; 102 N.E.2d 691; 27 ALR2d 1250, written by Judge Cardoza.

Ashley Marie Jenkins was a full-term birth, alive with a detectible heartbeat at 6:25 p.m. on February 9, 1989. She was delivered by cesarean section at 6:43 p.m. on February 9, 1989 with no detectible life signs, and pronounced dead at 7:00 p.m. on February 9, 1989, by the medical professionals.

Ashley Marie Jenkins had a legal personality from the time of her viability until the time she was delivered and apparently dead. She has been deprived of her life without due process or the right to sue accorded others who, when delivered by cesarean section, had signs of life.

Ashley Marie Jenkins was not accorded the rights of other tortiously injured children simply because her birth

was delayed. The delay is the basis of the suit and it was occasioned by the carelessness of the medical professionals.

She may not have been a citizen, since she was not yet born, but she certainly was a *person* and as a *person* she was entitled to the rights accorded other persons by the due process and equal protection clauses of the United States Constitution. The State of New York, by judicial decision, terminated the Constitutional rights of Ashley Marie Jenkins and her Estate.

The *Endresz* and *Tebbutt* cases are constitutionally wrong. They opined that the child can't sue until it sees the light of day. They are also medically wrong, since all children are born blind.

This Court, in *Roe v. Wade*, 410 U.S. 113 and in *Planned Parenthood of Southeastern Pennsylvania, et al. v. Casey*, 1992 U.S. Lexis 4751; 60 U.S.L.W. 4795, recognizes the right of a woman to choose the termination of an unwanted pregnancy. It is indicated in some of the language of these opinions, that this right terminates with fetal viability and only exists in pre-viability cases.

The medically delayed birth of Ashley Marie Jenkins through a late surgical incision did not make Ashley Marie Jenkins a *person*. She was a *person* when she achieved viability. She was viable and in obvious fetal distress

eighteen (18) minutes before her cesarean birth. A copy of the medical opinion attesting to malpractice is attached in the appendix at (A17-A18).

Respectfully submitted,

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APPENDIX.

Court of Appeals Order, December 15, 1993

STATE OF NEW YORK
COURT OF APPEALS

At a session of the Court, held at Court of Appeals Hall in the City of Albany on the Fifteenth day of December, 1993.

Present:

Hon. Judith S. Kaye, Chief Judge, presiding

THERESA A. LAPAGE, & C., *et al.*,

Appellants,

v.

LYNNE DICOSTANZO, & C., *et al.*,

Respondents.

Mo. No. 1161
3-10

A motion for leave to appeal to the Court of Appeals in the above cause having heretofore been made upon the part of the appellants herein and papers having been submitted

thereon and due deliberation having been thereupon had, it is

ORDERED, that the said motion be and the same hereby is denied.

Court of Appeals Decision
December 15, 1993

STATE OF NEW YORK
COURT OF APPEALS

THERESA A. LAPAGE, & C., *et al.*,

v.

LYNNE DICOSTANZO, & C., *et al.*,

Respondents.

Mo. No. 1161
3-10

Motion for leave to appeal denied.

Court of Appeals Decision,
September 14, 1993

STATE OF NEW YORK
COURT OF APPEALS

THERESA A. LAPAGE, & C., *et al.*,

Appellants,

v.

LYNNE DICOSTANZO, & C., *et al.*,

Respondents.

Mo. No. 1017
SSD 55

Appeal dismissed without costs, by the Court *sua sponte*, upon the ground that no substantial constitutional question is directly involved

Judge Levine took no part.

A5

Appellate Division Memorandum and Order
June 17, 1993

SUPREME COURT—APPELLATE DIVISION
THIRD JUDICIAL DEPARTMENT

Decided and Entered: June 17, 1993

67246

THERESA A. LAPAGE, Individually and as Natural Parent and Limited Administrator of the Estate of ASHLEY M. JENKINS, Deceased, *et al.*,

Appellants,

v.

LYNNE DiCOSTANZO, *et al.*,

Respondents.

Calendar Date: April 21, 1993

Before: Mikoll, J.P., Yesawich Jr., Mercure, Crew III and Harvey, JJ.

O'Connell, Wolfe & O'Connell (J. Byron O'Connell of counsel), Plattsburgh, for appellants.

Michael Saunders Law Office (Kenneth Mauro, Great Neck, of counsel), New York City, for Lynne DiCostanzo, respondent.

Martin, Ganotis, Brown, Mould & Currie, P.C. (David R. Klotz of counsel), Syracuse for Reuven Levy, respondent.

Conboy, McKay, Bachman & Kendall (William F. Maginn Jr., of counsel), Canton, for Alice Hyde Memorial Hospital, respondent.

Harvey, J.

Appeal from an order of the Supreme Court (Plumadore, J.), entered October 26, 1992 in Franklin County, which, *inter alia*, granted defendants' motions for summary judgment dismissing the first cause of action.

On the evening of February 9, 1989, Reuven Levy was called in by defendant Lynne DiCostanzo, to assist in a Caesarean section delivery of a full-term fetus carried by plaintiff Theresa A. La Page. By the time it was delivered, however, the baby was already dead. La Page and the baby's father thereafter commenced this action against defendants alleging one cause of action for wrongful death on the baby's behalf and a second cause of action by La Page alone for her claimed damages arising out of defendants' actions. Following joinder of issue, all defendants separately moved for summary judgment requesting, *inter alia*, that the wrongful death action be dismissed on the basis that New York does not recognize a wrongful death cause of action for a stillborn child. Although in opposition to these mo-

tions plaintiffs initially argued that their baby was born alive, it was ultimately conceded that the baby was stillborn and plaintiffs instead argued for a modification of the current law. Supreme Court thereafter dismissed the wrongful death cause of action and this appeal by plaintiffs ensued.

We affirm. Plaintiffs do not dispute the fact that the law in New York is that no wrongful death cause of action exists on behalf of a stillborn fetus (*see, Endresz v. Friedberg*, 24 NY2d 478, 482-487; *see also, Tebbutt v. Virostek*, 65 NY2d 931, 933; *Raymond v. Bartsch*, 84 AD2d 60, *lv denied* 56 NY2d 508). While plaintiffs raise several interesting arguments in support of their claim that the law should be changed, this court has stated before that reconsideration of the law established in *Endresz v Friedberg (supra)* "must be addressed to the Legislature or the Court of Appeals" (*Raymond v Bartsch, supra*, at 62). Accordingly, we cannot conclude that the wrongful death cause of action was inappropriately dismissed *(see, Indilicato v Bellevue Maternity Hosp.*, 108 AD2d 997).

Mikoll, J.P., Yesawich Jr., Mercure and Crew III, JJ. concur.

ORDERED that the order is affirmed, without costs.

Order Appealed From, October 17, 1992

STATE OF NEW YORK, SUPREME COURT,

COUNTY OF FRANKLIN.

THERESA A. LAPAGE and GREGORY KENT JENKINS, as natural parents and limited administratrices of the Goods Chattels and Credits of ASHLEY MARIE JENKINS, Deceased, and THERESA A. LAPAGE, Individually,

Plaintiffs,

against

LYNNE DI COSTANZO, M.D., REUVEN LEVY PHYSICIAN, P.C., and ALICE HYDE MEMORIAL HOSPITAL,

Defendants.

ORDERED, ADJUDGED AND DECREED, that the first cause of action, a cause of action for wrongful death as to he deceased infant plaintiff ASHLEY MARIE JENKINS, is severed from the remaining cause of action, and it is further

ORDERED ADJUDGED AND DECREED, that as aforesaid severed first cause of action is in all respects dismissed; and it is further

ENTER, in
County of Franklin

/s/ JAN H. PLUMADORE
Supreme Court—Franklin County

Order docketed as a Judgment
this 17th day of October, 1992.

Memorandum of Law

STATE OF NEW YORK, SUPREME COURT

COUNTY OF FRANKLIN.

THERESA A. LAPAGE and GREGORY KENT JENKINS, as Natural Parents and Limited Administratrices of the Goods, Chattels and Credits of ASHLEY MARIE JENKINS, Deceased, and THERESA A. LAPAGE, Individually,

Plaintiff,

against

LYNNE DI COSTANZO, M.D., REUVEN LEVY, PHYSICIAN, P.C. and ALICE HYDE MEMORIAL HOSPITAL,

Defendants.

It is respectfully submitted that the law as enunciated, albeit correctly, by the defendants, is wrong and it is time to change the law. The law is based on the decision of law in *Endresz v. Friedberg,* 24 N.Y.S.2d 478 and *Tebbutt v. Virostek,* 65 N.Y.S.2d 931, two (2) Court of Appeals cases and *Witrak v. Nassaw E.R. Co.* (1900) 52 A.D. 234, 65 N.Y.S. 257; *Muschetti v. Charles Pfitzer & Co.* (1955) 208 Misc. 870, 144 N.Y.S. 2d 235.

What we are urging is that, since the fetus was viable and almost born, it had a legal personality sufficient to permit this cause of action.

What we are urging is that, the rule be changed which produces the absurd result that a child, who is badly injured, but born alive, can recover, while an unborn child, who is more severely injured and dies, can recover nothing.

The Constitution in Amendment 14 thereof provides:

> "All persons *born* or naturalized in the United States, and subject to the Jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the Unites States; nor shall any state deprive any *person* of life, liberty, or property, without due process of the laws; nor deny to any *person* within its jurisdiction the equal protection of the laws."

Since this child was capable of existence, independent of the mother, it was a *person* and it was entitled to the same rights as any other *person* and it was entitled not to be deprived of its life without due process of law.

Until it reached liability, perhaps one could argue it was an adjunct of the mother, but once it achieved viability, it was entitled to the same rights as any other *citizen* or *person,* the right not to have a tort committed upon it and the right not to be discriminated against in favor of those less severely injured.

Appellate Division Brief,
November 24, 1992

STATE OF NEW YORK, SUPREME COURT
APPELLATE DIVISION,
THIRD JUDICIAL DEPARTMENT

THERESA A. LAPAGE and GREGORY KENT JENKINS, as Natural Parents and Limited Administratrices of the Goods Chattels and Credits of ASHLEY MARIE JENKINS, Deceased, and THERESA A. LAPAGE, Individually,

Plaintiffs/Appellants,

against

LYNNE DI COSTANZO, M.D., REUVEN LEVY PHYSICIAN, P.C., and ALICE HYDE MEMORIAL HOSPITAL,

Defendants/Respondents.

Certainly if the child is born alive, it has an action for prenatal tort [See *Woods v. Lancet* (1951), 303 N.Y. 349; 102 N.E.2d 691; 27 ALR2d 1250].

This infant, Plaintiffs/Appellants' Intestate Ashley Marie Jenkins was alive and had a heart beat at 6:25 p.m. The infant was born eighteen (18) minutes later at 6:43 p.m., and pronounced dead at 7:00 p.m. after efforts to resuscitate the infant failed.

It is the argument of counsel for the Plaintiffs/Appellants' Intestate's representatives that the law as enunciated in the Court below is wrong and it is time to change the law.

The law is based upon the two (2) decisions of *Endresz v. Friedbert, et al.*, 24 N.Y.2d 478 and *Tebbutt v. Virostek*, 65 N.Y.2d 931; 483 N.E.2d 1142.

What we are urging this Court, as we urged the Court below, is that this child was alive and viable within eighteen (18) minutes of being separated from its mother. It had a legal personality (despite the *Endresz* case) sufficient to permit a cause of action for wrongful death and conscious pain and suffering. We urge that separation from the mother, in birth, should not be the sole criteria for a cause of action for wrongful death. We urge that there was a wrong committed to Plaintiffs/Appellants' Intestate Ashley Marie Jenkins and there must be a remedy. We urge that when a medical professional commits negligent acts producing death, that medical professional should not be immune from a lawsuit. If the same medical professional badly injured an infant and the infant was born alive the medical professional would be liable.

Amendment 14 of the United States Constitution uses the word "born" or naturalized in describing persons who are citizens. It goes on to say that the State cannot deprive any *person* of life, liberty or property without due process of law, nor, deny to any person equal protection of the laws. We submit that the classification of a child alive and capable of being born within eighteen (18) minutes as having no cause of action and in allowing the mentally defective child born alive to have a cause of action is an arbitrary and unjust discrimination and does deprive the stillborn of equal protection under the law and further does deprive the stillborn of its life without due process of law.

This infant was viable and capable of existence without its mother when the tort was committed. The fetal monitor tapes and the testimony of the Nurse on the Obstetrical Floor substantiate this. Since this infant was capable of existence, it was a person entitled to the same rights as any other person and was entitled not to be deprived of its life without due process of law.

Jurisdictional Statement

STATE OF NEW YORK, COURT OF APPEALS

THERESA A. LAPAGE and GREGORY KENT JENKINS, as Natural Parents and Limited Administratrices of the Goods Chattels and Credits of ASHLEY MARIE JENKINS, Deceased, and THERESA A. LAPAGE, Individually,

Plaintiffs/Appellants,

against

LYNNE DI COSTANZO, M.D., REUVEN LEVY PHYSICIAN, P.C., and ALICE HYDE MEMORIAL HOSPITAL,

Defendants/Respondents.

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infant was born alive, the medical professionals would be liable.

Amendment 14 of the United States Constitution uses the word "born" or naturalized in describing persons who are citizens. It goes on to say that the State cannot deprive any *person* of life, liberty or property without due process of law, nor, deny to any *person* equal protection of the laws. We submit that the classification of a child alive and capable of being born within eighteen (18) minutes as having no cause of action and in allowing the mentally defective child born alive to have a cause of action is an arbitrary and unjust discrimination and does deprive the stillborn of equal protection under the law and further does deprive the stillborn of its life without due process of law.

Perhaps before viability, it was an adjunct of the mother, but, once it achieved viability, the infant was entitled to the same rights as any other citizen or person and entitled to the right not to have a tort committed upon it and entitled to the right not to be discriminated against in favor of those who lived an additional eighteen (18) minutes.

In January 20, 1993, the Journal of the American Medical Association reported a positive association between malpractice claims and the rate of Caesarean Delivery (Relationships Between Malpractice Claims and Cesarean Delivery, JAMA, Vol. 269, No. 3). Personal Injury Verdict Reviews Volume 1, Issue 8, April 22, 1993, indicates that medical malpractice claims for infants injuries in birth average $2,000,000.00 by jury award. It would certainly be cheaper for the medical profession to let the fetus die. This is the effect of the *Endresz* and *Tebbutt* cases.

Letter from Richard E. Murphy, M.D.
December 20, 1990

Mr. J. Byron O'Connell
O'Connell, Wolfe and O'Connell
Attorneys at Law
10 Healey Avenue
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Plattsburgh, New York 12901

Re: Theresa A. LaPage
DOB: 9/13/60

Dear Mr. O'Connell:

American College of Obstetrics and Gynecology standards of care for emergency Cesarean Section is that if a hospital is going to be in the practice of giving obstetrical care, it must be able to perform an emergency Cesarean Section and deliver the baby within 30 minutes of the decision to perform the Cesarean Section.

In reviewing the records of Theresa LaPage, she was admitted into the hospital at 16:00 p.m. (4:00 p.m.) on 2/9/89. This date and time was taken from the hospital admission form. A consent form was signed at 16:45 p.m. (4:45 p.m.).

First progress note was timed at 17:20 p.m. (5:20 p.m.). It was noted that the patient had ruptured membranes, meconium, and suspicious monitor. At 17:45 p.m. (5:45 p.m.), the decision was made to perform a Cesarean Section. According to ACOG standards, the baby should have been delivered before 18:15 p.m. (6:15 p.m.). The operative report states that the patient went in the operating room at 18:25 p.m. (6:25 p.m.). and the incision was made at 18:37

p.m. (6:37 p.m.). The baby was delivered at 18:43 p.m. (6:43 p.m.), exactly 58 minutes after the decision to perform a Cesarean Section was made. Again, according to ACOG, if a Cesarean Section is indicated because of acute fetal problems, these babies should be delivered in 30 minutes or less.

According to the records, we have a deviation from the standards of obstetrical care that resulted in a fresh stillborn. It is not clear from the records why Cesarean Section was not performed in sufficient time.

If you have any further questions, please feel free to contact my office.

Sincerely,

Richard E. Murphy, M.D.

REM/lls

(2) 93-1164

No. 91-192

Supreme Court, U.S.
FILED
FEB 3 1994
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

October Term, 1993

THERESA A. LaPAGE and GREGORY KENT JENKINS, as Natural Parents and Limited Administratrices of the Goods, Chattels and Credits of ASHLEY MARIE JENKINS, Deceased, and THERESA A. LaPAGE, Individually,

Petitioners,

against

LYNNE Di COSTANZO, M.D., REUVEN LEVY, P.C. and ALICE HYDE MEMORIAL HOSPITAL,

Respondents.

APPEAL FROM THE APPELLATE DIVISION, THIRD DEPARTMENT, OF THE SUPREME COURT OF THE STATE OF NEW YORK

BRIEF FOR RESPONDENT ALICE HYDE MEMORIAL HOSPITAL IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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Counterstatement of Question Presented for Review

1. Does New York State's Wrongful Death Statute violate the due process and equal protection clauses of the Fourteenth Amendment of the United States Constitution?

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No. 91-192

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1993.

THERESA A. LAPAGE and GREGORY KENT JENKINS, as Natural Parents and Limited Administratrices of the Goods, Chattels and Credits of ASHLEY MARIE JENKINS, Deceased, and THERESA A. LAPAGE, Individually,

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LYNNE DICOSTANZO, M.D., REUVEN LEVY, P.C. and ALICE HYDE MEMORIAL HOSPITAL,

Respondents.

APPEAL FROM THE APPELLATE DIVISION, THIRD DEPARTMENT, OF THE SUPREME COURT OF THE STATE OF NEW YORK

Brief for Respondent Alice Hyde Memorial Hospital in Opposition to Petition for Writ of Certiorari

The Respondent, Alice Hyde Memorial Hospital, respectfully requests that the Court deny the petition for a writ

of certiorari seeking review of the decision of the Appellate Division, Third Judicial Department, dated June 17, 1993, and the denial of the application to the New York State Court of Appeals for review of the Appellate Division's decision denying review.

Statement of the Case

The Petitioners commenced an action attempting recovery for the birth of a stillborn fetus. This was in direct contravention of the longstanding rule in New York that a stillborn fetus is not a legally protected entity pursuant to the wrongful death statute.

The Trial Court granted the Respondent's motion to dismiss the Petitioner's cause of action on behalf of the stillborn infant but the individual cause of action for injury to the Petitioner mother still remains. The Appellate Division upheld the decision of the Trial Judge and the Court of Appeals denied an application for a review. It is the position of the Respondent, Alice Hyde Memorial Hospital, that the Decision and Order of the Court below should be affirmed, and the longstanding rules and principles regarding this area of the law in the State of New York should be followed.

Reasons for Denying the Writ

I.

The Law of New York State regarding the cause of action on behalf of a stillborn fetus is clearly set forth in New York's Estates Powers and Trusts Law Section 5-4.1 and the cases interpreting it.

That portion of the Estates Powers and Trusts Law which governs this issue is Section 5-4.1 and provides in its pertinent part as follows:

> "The personal representative . . . of a decedent who is survived by distributees may maintain an action to recover damages for a wrongful act, neglect or default which caused the decedent's death against a person who would have been liable to the decedent by reason of such wrongful conduct if death had not ensued."

The case of *Endresz v. Friedberg, et al.*, 24 NY2d 478, since 1969 the leading case in this area, has held that before there is a decedent there must be a person born alive. The legislature did not intend to include an unborn fetus within the term decedent.

Most of the issues that are raised by the Petitioners in this matter were addressed in the *Endresz* case.

At pages 8 and 9 of Petitioners' Brief, they argue that the court appointed representatives of the deceased, are denied the right to sue accorded to a person who lives eighteen (18)

minutes longer than she did and stated that the medical professionals were responsible for her delayed birth. They next set forth that Ashley Marie Jenkins was a full-term birth, alive with a detectible heartbeat at 6:25 p.m. on February 9, 1989. At 6:43 p.m. she was stillborn. Again, they state that she had a legal personality from the time of her viability until the time that she was delivered and apparently dead. Using those facts, they argue that she has been deprived of her life without due process or the right to sue accorded others who, when delivered by caesarean section, had signs of life and further, that she was not accorded the rights of other tortiously injured children simply because her birth was delayed. Obviously, they argue that the basis of the suit was occasioned by the carelessness of the medical professionals.

These matters were specifically addressed in the *Endresz* case, starting at page 484.

> "The hardship of many of the decisions denying relief (in prenatal injury cases) lay in the fact that they required an infant to go through life * * * bearing the seal of another's fault. There is no such justification in the wrongful death situation. * * *
>
> A fundamental basis of tort law is the provision for compensation of an innocent plaintiff for the loss he has suffered. Tort law is not, as a general rule, premised upon punishing the wrongdoer. It is not submitted that the tortious destroyer of a child *in utero* should be able to escape completely by killing instead of merely maiming. But it is submitted that to compensate the parents any further than they are entitled by well-settled principles of law and to give

them a windfall through the estate of the fetus is blatant punishment."

Further, beginning on page 485, the *Endresz* case continues:

"It is urged that, since a child *en ventre sa mere* is considered in being or alive for purposes of taking property and, in addition, is to some extent protected by the criminal and public health laws, it should likewise be so regarded and treated when injured *in utero* and, indeed, deemed a "decedent" under Section 5-4.1 of the EPTL even when stillborn. However, as the court observed in *Matter of Roberts* (158 Misc. 698, 699), the property and other laws referred to were made "solely for the protection of the child and not for the benefit of those who take through the child." In point of fact, although an unborn child has certain rights under property law, his enjoyment of those rights is contingent upon his being born alive. As the court wrote in *Matter of Peabody* (5 NY 2d 541, 547, *supra*) -where, relying upon *Logan* (3 NY 2d 800, *supra*), we held that a child *en ventre sa mere* is not a person "beneficially interested" in an irrevocable trust within the meaning of Section 23 of the Personal Property Law and hence his consent was not required for its revocation—it is only if "the child [is] later born and able to take possession of the gift or inheritance" that such a child is "considered born and living" (p. 546). In other words, even if, as science and theology teach, the child begins a separate "life" from the moment of conception, it is clear that, "except in so far as is necessary to protect the child's own rights" *(Matter of Roberts,* 158 Misc. 698, 699, *supra*), the law has never considered the

> unborn fetus as having a separate "juridical existence" (*Drabbels v. Skelly Oil Co.*, 155 Neb. 17, 22) or a legal personality or identity "unless it sees the light of day." (*Matter of Peabody*, 5 NY 2d 541, 547, *supra*.) Indeed, one court has noted that, although a child *en ventre sa mere* may inherit, a stillborn child may not pass his estate to heirs or next of kin and there is no way that next of kin may assert a right to share in the child's inchoate estate. (See, e.g., *Hegan v. McDaniel*, 204 Tenn. 235.) Translated into tort law, this means that there is but a "conditional prospective liability * * * created when an unborn child * * * is injured" through the wrongful act of the defendant, and such liability attaches only upon fulfillment of the condition that the child be born alive. (*Keyes v. Construction Serv.*, 340 Mass. 633, 636.)"

The *Endresz* case has stood for twenty-five years as the law of the State of New York. During that period of time, the legislature has chosen not to revise that section of the Estates Powers and Trusts Law. Therefore, the only interpretation that can be given is that it is the intention of the legislature of the State of New York to uphold the principle that a cause of action for wrongful death does not exist for a stillborn fetus. Specifically, the Petitioners have advised this Court that they are requesting that this Court change the law of the State of New York and substitute viability as the basis for the wrongful death action.

II.

The word "person" as used in the Fourteenth Amendment has not been interpreted to include the unborn.

At page 9 of the Petitioners' brief, they argue that the stillborn infant may not have been a citizen, since she was not yet born but she certainly was a "person" and as a "person" she was entitled to the rights accorded other "persons" by the due process and equal protection clauses of the United States Constitution. They further argue that the State of New York by judicial decision, terminated the constitutional rights of Ashley Marie Jenkins and her estate.

The Petitioners herein have cited the case of *Roe v. Wade* (410 U.S. 113, 35 L Ed 2d 147, 93 S Ct 705). Respondent contends that this is misplaced. The *Roe* case clearly holds that the Constitution does not define the word "person" to include the unborn. At page 179 of that case, this Court has held the following:

> "The Constitution does not define "person" in so many words, Section 1 of the Fourteenth Amendment contains three references to "person." The first, in defining "citizens", speaks of "persons born or naturalized in the United States." The word also appears both in the Due Process Clause and in the Equal Protection Clause. "Person" is used in other places in the Constitution: in the listing of qualifications for Representatives and Senators, Art I, Section 2, cl 2, and Section 3, cl 3; in the Apportionment Clause, Art I, Section 2, cl 3; in the Migration and Importation provision, Art I, Section 9, cl 1;

> in the Emolument Clause, Art I, Section 9, cl 8; in the Electors provisions, Art II, Section 1, cl 2, and the superseded cl 3; in the provision outlining qualifications for the office of the President, Art II, Section 1, cl 5; in the Extradition provisions, Art IV, Section 2, cl 2, and the superseded Fugitive Slave Clause 3; and in the Fifth, Twelfth, and Twenty-second Amendments, as well as in Sections 2 and 3 of the Fourteenth Amendment. But in nearly all these instances, the use of the word is such that it has application only postnatally. *None indicates, with any assurance, that it has any possible prenatal application.*
>
> All this, together with our observation, *supra*, that throughout the major portion of the 19th century prevailing legal abortion practices were far freer than they are today, *persuades us that the word "person" as used in the Fourteenth Amendment, does not include the unborn.*"

Therefore, although the Petitioner argues that Ashley Marie Jenkins became a person when she achieved viability, and that the language in some of the opinions in the cited cases, namely *Roe*, stand for the fact that the right terminates with fetal viability and only exists in pre-viability cases, it can be seen from the above language that this is wrong. This Court has spoken on the meaning of the word "person" and held it to have no prenatal application.

CONCLUSION

The petition for writ of certiorari should be denied.

Dated: Canton, New York
January 27, 1994

Respectfully Submitted,

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Supreme Court of the United States

October Term, 1993

THERESA A. LaPAGE and GREGORY KENT JENKINS, as Natural Parents and Limited Administratrices of the Goods, Chattels and Credits of ASHLEY MARIE JENKINS, Deceased, and THERESA A. LaPAGE, Individually,

Petitioners,

against

LYNNE Di COSTANZO, M.D., REUVEN LEVY, P.C. and ALICE HYDE MEMORIAL HOSPITAL,

Respondents.

APPEAL FROM THE APPELLATE DIVISION, THIRD DEPARTMENT, OF THE SUPREME COURT OF THE STATE OF NEW YORK

BRIEF FOR RESPONDENT REUVEN LEVY, PHYSICIAN, P.C. IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Whether there exist independent and adequate state grounds for the decision of the Appellate Division, Third Department affirming the dismissal of Petitioners' cause of action for wrongful death, asserted by the personal representatives of a stillborn fetus?

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BRIEF OF RESPONDENT REUVEN LEVY, P.C. IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

APPLICABLE CONSTITUTIONAL PROVISIONS AND STATUTES

United States Code: 28 USC 1257(a)

New York Statutes: CPLR § 5601(b)(1)
CPLR § 5602(a)(1)(i)

STATEMENT OF THE CASE

This is an action for alleged medical malpractice. The facts are largely undisputed.

Theresa A. LaPage was admitted to the Defendant-Respondent Alice Hyde Memorial Hospital on February 9, 1989 for obstetrical care. At 5:33 P.M. an internal fetal monitor was placed. It was removed at 6:25 P.M. when Ms. LaPage was moved from the obstetrics floor to an operating room. Defendant-Respondent Reuven Levy, M.D. was called to assist Defendant-Respondent Lynne DiCostanzo, M.D. in the performance of an emergency cesarean section upon Ms. LaPage. He first saw Ms. LaPage on February 9th when she arrived in the operating room.

Ms. LaPage was anesthetized at 6:35 p.m. At 6:43 P.M. a stillborn fetus was delivered. All parties have agreed that the fetus was, in fact, stillborn.

This action was commenced in the Supreme Court, Franklin County, State of New York by service of a summons and complaint alleging two causes of action. First, Petitioners have asserted a cause of action for the alleged wrongful death and conscious pain and suffering of the stillborn infant. The alleged cause of action for wrongful death is governed by EPTL § 5-4.1. Second, Petitioner Theresa LaPage claims a cause of action for the physical and emotional injuries she allegedly suffered as a result of the Respondents' negligent performance of the cesarean section on February 9, 1989.

In the Supreme Court, Respondents moved for the summary judgment dismissal of Petitioners' first cause of action. In support of their motion Respondents argued that the alleged infant plaintiff was not born alive and that the law of New York unequivocally bars recovery under the wrongful death statute by the personal representative(s) of a stillborn fetus which allegedly died as a result of injuries received while en ventre sa mere. In an Order dated September 4, 1992, the Honorable Jan H. Plumadore, Supreme Court, Franklin County dismissed Petitioners' first cause of action for the alleged wrongful death and conscious pain and suffering of the stillborn fetus.

Petitioners appealed to the Supreme Court, Appellate Division, Third Department as of right, pursuant to applicable provisions of Article 55 of New York's Civil Practice Law and Rules. In their Memorandum and Order entered on June 17, 1993, the Appellate Division, Third Department affirmed the lower court, confirming the validity of a long line of precedent refusing to extend a cause of action for wrongful death in New York to the personal representative(s) of a stillborn fetus. The Appellate Division empha-

sized that any reconsideration of the rule established in this precedent would be a task for New York's Court of Appeals or the New York Legislature. (Petitioner's Appendix, A5-A7)

Petitioners next sought an appeal as of right to New York's highest court, the Court of Appeals. Petitioners sought this appeal pursuant to CPLR § 5601(b)(1), which allows an appeal from an order of the Appellate Division finally determining an action where there is directly involved a substantial constitutional (New York or federal) question.

On September 14, 1993, the Court of Appeals dismissed Petitioners request for an appeal as of right. The Court based its dismissal "upon the ground that no substantial constitutional question is directly involved." (Petitioner's Appendix, A4)

Petitioners next made a motion seeking permissive leave to appeal to the Court of Appeals, presumably pursuant to CPLR § 5602(a)(1)(i). In a decision dated December 15, 1993, the Court of Appeals denied Petitioners motion for leave to appeal. (Petitioner's Appendix, 3).

Petitioners now seek a writ of certiorari.

SUMMARY OF ARGUMENT

The Supreme Court is without jurisdiction to grant certiorari in this case because the state court decision below rests upon independent and adequate state grounds. The court below dismissed Petitioners' first cause of action in

which they alleged a cause of action for wrongful death as the personal representatives of a stillborn fetus. The state court decision was based on a long and consistent line of precedent construing New York's wrongful death statute, itself a legislative creation, to forbid such claims.

The lower court did not raise any federal constitutional issues in its decision. Nor is federal law presented as a decisional underpinning in the long line of precedent consistently construing New York's wrongful death statute since its inception in 1847 to forbid the personal representative of a stillborn fetus a cause of action for wrongful death.

The presumption favoring certiorari established in *Michigan v. Long*, 463 U.S. 1032, 103 S.Ct. 3469 (1983) does not apply in this case because the state court decision neither rests primarily on nor is interwoven with federal law; and because the adequacy of the state law rationale is clear from the face of the opinion. The lower court decision is neither formulary nor obfuscatory in its reliance on state law to decide the instant question.

Petitioners argue that United States Supreme Court decisions render New York's rule "constitutionally wrong" because a woman's right to terminate an unwanted pregnancy "only exists in pre-viability cases." They fail to grasp the import of *Roe v. Wade*, 410 U.S. 113 (1973) and its progeny; particularly *Planned Parenthood v. Casey*, 112 S.Ct. 2791, 2821 (1992). The Supreme Court has unequivocally ruled that the word "person", as used in the Fourteenth Amendment, and "person" as it is used in nearly every instance in the United States Constitution do not include the unborn. *Roe v. Wade*, *supra*, 410 U.S. at 158; *Keith v. Daley*, 764 F.2d 1265 (7th Cir. 1985), *cert. denied Illinois Pro-Life*

Coalition, Inc. v. Keith, 474 U.S. 980 (1985). These cases clearly do not require New York to reverse its longstanding refusal to allow the personal representatives of a stillborn fetus to sue for wrongful death.

The predicate to Supreme Court review by certiorari, the presence of an issue of federal law and the absence of an independent and adequate state ground for the decision do not exist in this case. It is, therefore, respectfully requested that certiorari be denied the Petitioners.

ARGUMENT

THE SUPREME COURT IS WITHOUT JURISDICTION TO GRANT CERTIORARI BECAUSE THE DECISION BELOW RESTS UPON INDEPENDENT AND ADEQUATE STATE GROUNDS

Respect for the independence of state courts, general unfamiliarity with state laws, and a desire to avoid rendering advisory opinions have been the basis for the Supreme Court's refusal to decide cases where there is an independent and adequate state ground for the decision below. *Illinois v. Rodriguez*, 110 S.Ct. 2793 (1990); *Michigan v. Long*, 463 U.S. 1032, 1040, 103 S.Ct. 3469, 3476 (1983). In such cases, the Supreme Court will not undertake to review any federal issue because its resolution would not affect the judgment in any way, amounting to nothing more than an advisory opinion. *Herb v. Pitcairn*, 324 U.S. 117, 125-26, 65 S.Ct. 459, 462-64 (1945). Thus, it has been clearly established that the Supreme Court will "not review a question of federal law decided by a state court if the decision of that court rests on a state law ground that is independent of

the federal question and adequate to support the judgment." *Coleman v. Thompson*, 111 S.Ct. 2546, 2553-54 (1991) (*referring to Fox Film Corp. v. Muller*, 296 U.S. 207, 210, 56 S.Ct. 183, 184 [1935]); *Klinger v. Missouri*, 13 Wall. 257, 263, 20 L.Ed. 635 (1872).

This rule applies whether the state law ground is procedural or substantive. *See, e.g., Fox Film, supra*; *Herndon v. Georgia*, 295 U.S. 441, 55 S.Ct. 794 (1935). The independent and adequate state ground doctrine has been held to apply in direct review proceedings, and is jurisdictional. *See Coleman v. Thompson, supra*, 111 S.Ct. at 2554. Finally, it is incumbent upon the Supreme Court to ascertain for itself whether the asserted non-federal ground adequately supports the judgment below. *Michigan v. Long*, 463 U.S. 1032, 1038, 103 S.Ct. 3469, 3475 (1983). The standard of review will be *de novo*. *Howlett by and through Howlett v. Rose*, 110 S.Ct. 2430, 2437 (1990).

The facts of this case lend themselves to a simple and straightforward application of the independent and adequate state ground doctrine. The opinion of the Appellate Division, Third Department contains no discussion of federal law, makes no reference or citation to federal law, and clearly invokes state case law construing New York's wrongful death statute as the rationale for its decision. Further, the Appellate Division, Third Department did not raise any federal constitutional issues in its opinion. Nor is federal law presented as a decisional underpinning in the long line of precedent consistently construing New York's wrongful death statute since its inception in 1847 to forbid the personal representative of a stillborn fetus that dies as a result of injuries received while *en ventre sa mere* a cause of action for wrongful death. *See Endresz v. Friedberg*, 24

NY2d 478 (1969) (*referring to Milks v. McIver,* 264 N.Y. 267, 269 (1934) for the rule that "liability for damages caused by wrong ceases at a point dictated by public policy or common sense.")

THE LONG PRESUMPTION DOES NOT APPLY IN THIS CASE BECAUSE THE ADEQUACY AND INDEPENDENCE OF THE STATE LAW GROUND IS CLEAR IN THE OPINION BELOW

In 1983 there was established a conclusive presumption to be applied in certain direct review cases to address the problem presented by ambiguous state court decisions in applying the independent and adequate state ground doctrine. *Michigan v. Long,* 463 U.S. 1032, 103 S.Ct. 3469 (1983).

> [W]hen,...,a state court decision fairly appears to rest primarily on federal law, or to be interwoven with the federal law, and when the adequacy and independence of any possible state law ground is not clear from the face of the opinion, we will accept as the most reasonable explanation that the state court decided the way it did because it believed the federal law required it to do so. *Id.*, at 1041, 103 S.Ct. at 3476.

The *Long* presumption has been more recently reiterated. *Caldwell v. Mississippi,* 472 U.S. 320, 105 S.Ct. 2633 (1985).

There are, then, two requirements that must be met to trigger the *Long* presumption and invoke the jurisdiction of

the Supreme Court. First, the state court decision must "rest primarily" on or be "interwoven with" federal law. Second, the adequacy and independence of "any possible state law ground" must be unclear from the face of the opinion. *Id.*

In this case, the first requirement is not met. The decision of the Supreme Court, Appellate Division, Third Department neither rests upon nor is interwoven with federal law.

At issue is whether a wrongful death cause of action asserted on behalf of a stillborn fetus was properly dismissed in a state court. The parties agree that the law of New York is absolutely consistent. No wrongful death cause of action exists on behalf of a stillborn fetus. *See Endresz v. Friedberg*, *supra*, at 482-87; *Tebbutt v. Virostek*, 65 NY2d 931, 933 (1985); *Raymond v. Bartsch*, 84 AD2d 60 (3d Dept. 1981), *lv denied* 56 NY2d 508 (1982). The Appellate Division, Third Department affirmed the lower court decision without any reliance on or reference to federal law:

> [w]hile plaintiffs raise several interesting arguments in support of their claim that the law should be changed, this court has stated before that reconsideration of the law established in *Endresz v. Friedberg*, (*supra*) 'must be addressed to the Legislature or the Court of Appeals' (*Raymond v. Bartsch*, *supra*). Accordingly, we cannot conclude that the wrongful death cause of action was inappropriately dismissed (*See*, *Indilicato v. Bellevue Maternity Hosp.*, 108 AD2d 997 [3d Dept. 1985]).

Further, the decision of the Appellate Division was not "interwoven" with federal law. *Long*, *supra*, 463 U.S. at 1041, 103 S.Ct. at 3476. Unequivocally, the decision of the Third Department is neither formulary nor obfuscatory in its

rationale. *Compare, Ylst v. Nunnemaker,* 111 S.Ct. 2590, 2594 (1991) (the problem faced by the Supreme Court in applying the independent and adequate state ground doctrine arises when attribution of the reason underlying the decision of the court below is difficult and artificial).

The decision affirming the denial of a right of recovery under New York's wrongful death statute by the personal representative of a stillborn fetus which dies as a result of injuries sustained while *en ventre sa mere* is based upon a long line of state precedent construing New York's wrongful death statute to reject similar claims. *See Endresz v. Friedberg, supra*; *Indilicato v. Bellevue Maternity Hospital, supra*; *Raymond v. Bartsch, supra*. None of those decisions either rest squarely on federal law or make mention of federal law. Thus, there is no issue of federal law implicated in New York's interpretation of its wrongful death statute to be inferred from EPTL § 5-4.1 or the case law construing the statute.

A STILLBORN FETUS DOES NOT HAVE THE LEGAL PERSONALITY NECESSARY TO CHALLENGE NEW YORK'S WRONGFUL DEATH STATUTE

Petitioners fail to address the independent and adequate state ground doctrine in the argument contained in their Petition. Instead, they argue that the Supreme Court has jurisdiction over this case because "[t]he *Endresz* and *Tebbutt* cases are constitutionally wrong". This is so, Petitioners argue, because the United States Supreme Court has declared that a woman's right to terminate an unwanted pregnancy "only exists in pre-viability cases."

Petitioners fail to grasp the import of *Roe v. Wade*, 410 U.S. 113 (1973) and its progeny. It has been clearly established only that the state may not interfere with a woman's right to terminate her pregnancy before the fetus has attained viability. *Id.*, 410 U.S. at 163. In a recent partial reaffirmation of the *Roe* case, the Supreme Court was careful to neither confer nor require legal personality for fetuses that are deemed viable. "[S]ubsequent to viability, the state in promoting its interest in the potentiality of human life may, *if it chooses*, regulate, and even proscribe abortion except where necessary in appropriate medical judgment, for the preservation of the life of the mother." *Planned Parenthood v. Casey*, 112 S.Ct. 2791, 2821 (1992) (*citing Roe v. Wade*, 410 U.S. 113, 164) (emphasis supplied); *See also Ryan v. Beth Israel Hospital*, 96 Misc.2d 816, 409 N.Y.S.2d 681 (1978).

It should be further noted that in nearly every instance in the United States Constitution the use of the word "person" has not included stillborn infants. *Roe v. Wade*, *supra*, 410 U.S. at 158. Moreover, the Supreme Court has unequivocally ruled that the word "person", as used in the Fourteenth Amendment, does not include the unborn. *Roe v. Wade, supra*, 410 U.S. at 158; *Keith v. Daley*, 764 F.2d 1265 (7th Cir. 1985), *cert. denied Illinois Pro-Life Coalition, Inc. v. Keith*, 474 U.S. 980 (1985).

Federal law compels no decision on the question of whether to allow a cause of action under New York's wrongful death statute by the personal representative of a stillborn fetus. There can be, then, no issue of federal law germane to the resolution of this question. The decision properly lies with the New York Legislature and Court of Appeals. *See Endresz v. Friedberg*, 24 NY2d 478; EPTL § 5-4.1.

The New York Court of Appeals has addressed the question of whether Petitioners appeal directly involves any constitutional issues. In earlier proceedings in this action, Petitioners sought an appeal as of right to the Court of Appeals of New York pursuant to CPLR § 5601(b)(1). Such appeals will be allowed only from an order of the Appellate Division which finally determines an action where there is directly involved a substantial constitutional (New York or federal) question. *Hartnett v. Ballston Spa*, 75 NY2d 863 (1990); *Fine v. City of New York*, 75 NY2d 863 (1990).

In cases where the decision of the Appellate Division was or may have been based on grounds not involving constitutional construction, no appeal as of right will lie pursuant to CPLR § 5601(b)(1). In one such case involving statutory construction issues and claims argued to be rooted in federal law New York's highest court wrote "[t]he core of the Appellate Division decision was its construction of the pertinent statutes. While the Court went on to find the Supreme Court's order . . . would contravene the Establishment Clause . . . [t]he constitutional discussion . . . appears to have been incidental to the Appellate Division holding." *Bd. of Education v. Weider*, 72 NY2d 174, 182-83 (*citing Matter of Haydorn v. Carroll*, 225 NY 84 [1918]). In their decision dated September 14, 1993 denying Petitioners' appeal as of right, the Court of Appeals based its decision "upon the ground that no substantial constitutional question is directly involved." (Petitioner's Appendix, 4)

THERE IS NO BASIS TO DISTURB THE EDIFICE OF NEW YORK PRECEDENT REFUSING TO ALLOW THE PERSONAL REPRESENTATIVE OF A STILLBORN FETUS A CAUSE OF ACTION FOR WRONGFUL DEATH

This issue sought to be addressed by Petitioners is clearly one of statutory construction. The wrongful death cause of action was legislatively created in 1847. *Gonzales v. New York Housing Authority*, 77 NY2d 663 (1991). In 1969, the seminal case, *Endresz v. Friedberg*, *supra*, was decided. The *Endresz* court traced the legislative and judicial history of New York's wrongful death statute. Their review failed to disclose any precedent to extend a wrongful death cause of action to the personal representative(s) of a stillborn fetus. The cases since *Endresz* have echoed its pronouncement. *See Byrn v. NYC Health and Hospitals Corporation*, 31 NY2d 194 (1972); *Tebbut v. Virostek*, 65 NY2d 931 (1985); *Raymond v. Bartsch*, *supra*; *Indilicato v. Bellevue Maternity Hospital*, *supra*.

In affirming the dismissal of Petitioners' wrongful death cause of action on behalf of the stillborn fetus, the Appellate Division, Third Department, relied on two of its prior decisions, *Indilicato v. Bellevue Maternity Hospital*, 108 A.D.2d 997 and *Raymond v. Bartsch*, 84 A.D.2d 60. In the *Indilicato* case, the Third Department affirmed the dismissal of a wrongful death cause of action for the wrongful death of an unborn child, citing *Endresz v. Friedberg*, 24 N.Y.2d 478. Four years prior, in the *Raymond v. Bartsch* case, the Third Department dismissed a similar cause of action for the wrongful death of an unborn child, again invoking the *Endresz* case. Justice Casey noted that "reconsideration of the

rule set forth in *Endresz* must be addressed to the Legislature or the Court of Appeals." *Raymond v. Bartsch, supra.*

The wrongful death statute and the *Endresz* decision remain consistent with the view that permeates the statutory and common law of New York. Legal personality is conferred at live birth.

For example, at common law the destruction of an unquickened fetus was not considered manslaughter. *Evans v. People*, 49 N.Y. 86 (1872). Further, a pregnant female who was sentenced to death would be executed unless the fetus had quickened. *See Byrn v. N.Y.C. Health and Hospitals Corp.*, 38 AD2d 316, 330 (2d Dept. 1972).

In addition, a criminal defendant cannot be charged with homicide in the death of an unborn fetus. This is so because the New York Legislature has excluded the unborn from the definition of "person" pertinent to homicide: "a human being who has been and is alive." Penal Law § 125.05(1); *See also People v. Hall*, 158 A.D.2d 69 (1st Dept. 1990).

Similarly, a woman consenting to a justifiable abortion cannot be a principal or an accomplice in the death of the fetus because the New York Legislature has not vested the fetus with legal personality. Were such legal personality conferred, criminal responsibility would, arguably, have to attach. Penal Law § 125.05 (1), (3); *See also Roe v. Wade*, 410 U.S. 113, 158 n.54 (1973).

The Court of Appeals has held that an unborn fetus is not a person beneficially interested in a trust such that their

consent need be obtained for revocation of that trust. *Matter of Peabody*, 5 N.Y.2d 541 (1959). The Court noted therein that an unborn fetus was not vested with legal personality until it was born alive. *Id.* at 547.

In general, the Court of Appeals has confirmed that it owes deference to consistent legislative determinations. In the absence of "a constitutional question, even the State's highest court may not refuse . . . to apply the plain import of an applicable statute, which, until and unless amended or repealed, must be respected as the law for all our people, no matter where positioned." *People v. Mackell*, 40 N.Y.2d 59, 64 (1976). Here the "plain import" of the applicable statute, particularly in view of the concurring legislative determinations in other areas of New York law, is that legal personality will be conferred, for purposes of maintaining a wrongful death cause of action, at live birth, not at viability. Should any reevaluation of New York's wrongful death statute need be undertaken, it is a task for the legislative branch of government. "[T]he perception and declaration of relevant public policy are best and most appropriately explored and resolved by the legislative branch of our government." *Murphy v. American Home Products Corporation*, 58 N.Y.2d 293 (1983).

It should be noted that precedents involving statutory interpretation are entitled to great stability. "After all, in such cases, courts are interpreting legislative intention and a sequential contradiction is a grossly arrogated legislative power. Moreover, if the precedent or precedents have 'misinterpreted' the legislative intention, the Legislature's competency to correct the misinterpretation is readily at hand." *People v. Hobson*, 39 N.Y.2d 479 (1976) (citing *Matter of Schinasi*, 277 N.Y. 252, 265-66 [1938]).

The doctrine of *stare decisis* "provides that once a court has decided a legal issue, subsequent appeals presenting similar facts should be decided in conformity with the earlier decision." *People v. Bing*, 76 N.Y.2d 331 (1990). As interpreted by the Court of Appeals, *stare decisis* militates strongly in favor of adhering to the legislative determination and judicial precedent in New York which do not extend the wrongful death cause of action to the personal representative(s) of the alleged estate of a stillborn fetus. This approach to *stare decisis* taken by the Court of Appeals recognizes goals of "efficiency, predictability, and uniformity." Wachtler, *Stare Decisis and a Changing New York Court of Appeals*, 59 St. John's Law Review 445, 446 (1985).

In this case, to allow a wrongful death action to be brought on behalf of a stillborn fetus would be to confer legal personality at a point in time prior to live birth. Such a change would be a radical departure from precedent as well as from the scheme of the statutory and common law in New York. Any such change would have far reaching implications and should only be undertaken by the legislature.

Simply put, the legislative purpose of New York's wrongful death statute has not been frustrated by case law interpreting the statute. Federal law does not require any departure from New York's longstanding refusal to permit the personal representative of a stillborn fetus to sue for wrongful death. The state court decision is not, therefore, based on federal law. It has as its rationale and independent and adequate state grounds.

CONCLUSION

For the foregoing reasons, it is respectfully requested that certiorari be denied the Petitioners.

Respectfully submitted,

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93-1164 (4)

No. 91-192

FEB 9 1994
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

October Term, 1993

THERESA A. LaPAGE and GREGORY KENT JENKINS, as Natural Parents and Limited Administratrices of the Goods, Chattels and Credits of ASHLEY MARIE JENKINS, Deceased, and THERESA A. LaPAGE, Individually,

Petitioners,

against

LYNNE Di COSTANZO, M.D., REUVEN LEVY, P.C. and ALICE HYDE MEMORIAL HOSPITAL,

Respondents.

APPEAL FROM THE APPELLATE DIVISION, THIRD DEPARTMENT, OF THE SUPREME COURT OF THE STATE OF NEW YORK

BRIEF FOR RESPONDENT REUVEN LEVY, PHYSICIAN, P.C. IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Whether there exist independent and adequate state grounds for the decision of the Appellate Division, Third Department affirming the dismissal of Petitioners' cause of action for wrongful death, asserted by the personal representatives of a stillborn fetus?

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BRIEF OF RESPONDENT REUVEN LEVY, P.C. IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

APPLICABLE CONSTITUTIONAL PROVISIONS AND STATUTES

United States Code: 28 USC 1257(a)

New York Statutes: CPLR § 5601(b)(1)
CPLR § 5602(a)(1)(i)

STATEMENT OF THE CASE

This is an action for alleged medical malpractice. The facts are largely undisputed.

Theresa A. LaPage was admitted to the Defendant-Respondent Alice Hyde Memorial Hospital on February 9, 1989 for obstetrical care. At 5:33 P.M. an internal fetal monitor was placed. It was removed at 6:25 P.M. when Ms. LaPage was moved from the obstetrics floor to an operating room. Defendant-Respondent Reuven Levy, M.D. was called to assist Defendant-Respondent Lynne DiCostanzo, M.D. in the performance of an emergency cesarean section upon Ms. LaPage. He first saw Ms. LaPage on February 9th when she arrived in the operating room.

Ms. LaPage was anesthetized at 6:35 p.m. At 6:43 P.M. a stillborn fetus was delivered. All parties have agreed that the fetus was, in fact, stillborn.

This action was commenced in the Supreme Court, Franklin County, State of New York by service of a summons and complaint alleging two causes of action. First, Petitioners have asserted a cause of action for the alleged wrongful death and conscious pain and suffering of the stillborn infant. The alleged cause of action for wrongful death is governed by EPTL § 5-4.1. Second, Petitioner Theresa LaPage claims a cause of action for the physical and emotional injuries she allegedly suffered as a result of the Respondents' negligent performance of the cesarean section on February 9, 1989.

In the Supreme Court, Respondents moved for the summary judgment dismissal of Petitioners' first cause of action. In support of their motion Respondents argued that the alleged infant plaintiff was not born alive and that the law of New York unequivocally bars recovery under the wrongful death statute by the personal representative(s) of a stillborn fetus which allegedly died as a result of injuries received while en ventre sa mere. In an Order dated September 4, 1992, the Honorable Jan H. Plumadore, Supreme Court, Franklin County dismissed Petitioners' first cause of action for the alleged wrongful death and conscious pain and suffering of the stillborn fetus.

Petitioners appealed to the Supreme Court, Appellate Division, Third Department as of right, pursuant to applicable provisions of Article 55 of New York's Civil Practice Law and Rules. In their Memorandum and Order entered on June 17, 1993, the Appellate Division, Third Department affirmed the lower court, confirming the validity of a long line of precedent refusing to extend a cause of action for wrongful death in New York to the personal representative(s) of a stillborn fetus. The Appellate Division empha-

sized that any reconsideration of the rule established in this precedent would be a task for New York's Court of Appeals or the New York Legislature. (Petitioner's Appendix, A5-A7)

Petitioners next sought an appeal as of right to New York's highest court, the Court of Appeals. Petitioners sought this appeal pursuant to CPLR § 5601(b)(1), which allows an appeal from an order of the Appellate Division finally determining an action where there is directly involved a substantial constitutional (New York or federal) question.

On September 14, 1993, the Court of Appeals dismissed Petitioners request for an appeal as of right. The Court based its dismissal "upon the ground that no substantial constitutional question is directly involved." (Petitioner's Appendix, A4)

Petitioners next made a motion seeking permissive leave to appeal to the Court of Appeals, presumably pursuant to CPLR § 5602(a)(1)(i). In a decision dated December 15, 1993, the Court of Appeals denied Petitioners motion for leave to appeal. (Petitioner's Appendix, 3).

Petitioners now seek a writ of certiorari.

SUMMARY OF ARGUMENT

The Supreme Court is without jurisdiction to grant certiorari in this case because the state court decision below rests upon independent and adequate state grounds. The court below dismissed Petitioners' first cause of action in

which they alleged a cause of action for wrongful death as the personal representatives of a stillborn fetus. The state court decision was based on a long and consistent line of precedent construing New York's wrongful death statute, itself a legislative creation, to forbid such claims.

The lower court did not raise any federal constitutional issues in its decision. Nor is federal law presented as a decisional underpinning in the long line of precedent consistently construing New York's wrongful death statute since its inception in 1847 to forbid the personal representative of a stillborn fetus a cause of action for wrongful death.

The presumption favoring certiorari established in *Michigan v. Long*, 463 U.S. 1032, 103 S.Ct. 3469 (1983) does not apply in this case because the state court decision neither rests primarily on nor is interwoven with federal law; and because the adequacy of the state law rationale is clear from the face of the opinion. The lower court decision is neither formulary nor obfuscatory in its reliance on state law to decide the instant question.

Petitioners argue that United States Supreme Court decisions render New York's rule "constitutionally wrong" because a woman's right to terminate an unwanted pregnancy "only exists in pre-viability cases." They fail to grasp the import of *Roe v. Wade*, 410 U.S. 113 (1973) and its progeny; particularly *Planned Parenthood v. Casey*, 112 S.Ct. 2791, 2821 (1992). The Supreme Court has unequivocally ruled that the word "person", as used in the Fourteenth Amendment, and "person" as it is used in nearly every instance in the United States Constitution do not include the unborn. *Roe v. Wade*, *supra*, 410 U.S. at 158; *Keith v. Daley*, 764 F.2d 1265 (7th Cir. 1985), *cert. denied Illinois Pro-Life*

Coalition, Inc. v. Keith, 474 U.S. 980 (1985). These cases clearly do not require New York to reverse its longstanding refusal to allow the personal representatives of a stillborn fetus to sue for wrongful death.

The predicate to Supreme Court review by certiorari, the presence of an issue of federal law an ' the absence of an independent and adequate state ground for the decision do not exist in this case. It is, therefore, respectfully requested that certiorari be denied the Petitioners.

ARGUMENT

THE SUPREME COURT IS WITHOUT JURISDICTION TO GRANT CERTIORARI BECAUSE THE DECISION BELOW RESTS UPON INDEPENDENT AND ADEQUATE STATE GROUNDS

Respect for the independence of state courts, general unfamiliarity with state laws, and a desire to avoid rendering advisory opinions have been the basis for the Supreme Court's refusal to decide cases where there is an independent and adequate state ground for the decision below. *Illinois v. Rodriguez*, 110 S.Ct. 2793 (1990); *Michigan v. Long*, 463 U.S. 1032, 1040, 103 S.Ct. 3469, 3476 (1983). In such cases, the Supreme Court will not undertake to review any federal issue because its resolution would not affect the judgment in any way, amounting to nothing more than an advisory opinion. *Herb v. Pitcairn*, 324 U.S. 117, 125-26, 65 S.Ct. 459, 462-64 (1945). Thus, it has been clearly established that the Supreme Court will "not review a question of federal law decided by a state court if the decision of that court rests on a state law ground that is independent of

the federal question and adequate to support the judgment." *Coleman v. Thompson*, 111 S.Ct. 2546, 2553-54 (1991) (*referring to Fox Film Corp. v. Muller*, 296 U.S. 207, 210, 56 S.Ct. 183, 184 [1935]); *Klinger v. Missouri*, 13 Wall. 257, 263, 20 L.Ed. 635 (1872).

This rule applies whether the state law ground is procedural or substantive. *See, e.g., Fox Film, supra*; *Herndon v. Georgia*, 295 U.S. 441, 55 S.Ct. 794 (1935). The independent and adequate state ground doctrine has been held to apply in direct review proceedings, and is jurisdictional. *See Coleman v. Thompson, supra*, 111 S.Ct. at 2554. Finally, it is incumbent upon the Supreme Court to ascertain for itself whether the asserted non-federal ground adequately supports the judgment below. *Michigan v. Long*, 463 U.S. 1032, 1038, 103 S.Ct. 3469, 3475 (1983). The standard of review will be *de novo*. *Howlett by and through Howlett v. Rose*, 110 S.Ct. 2430, 2437 (1990).

The facts of this case lend themselves to a simple and straightforward application of the independent and adequate state ground doctrine. The opinion of the Appellate Division, Third Department contains no discussion of federal law, makes no reference or citation to federal law, and clearly invokes state case law construing New York's wrongful death statute as the rationale for its decision. Further, the Appellate Division, Third Department did not raise any federal constitutional issues in its opinion. Nor is federal law presented as a decisional underpinning in the long line of precedent consistently construing New York's wrongful death statute since its inception in 1847 to forbid the personal representative of a stillborn fetus that dies as a result of injuries received while *en ventre sa mere* a cause of action for wrongful death. *See Endresz v. Friedberg*, 24

NY2d 478 (1969) (*referring to Milks v. McIver,* 264 N.Y. 267, 269 (1934) for the rule that "liability for damages caused by wrong ceases at a point dictated by public policy or common sense.")

THE LONG PRESUMPTION DOES NOT APPLY IN THIS CASE BECAUSE THE ADEQUACY AND INDEPENDENCE OF THE STATE LAW GROUND IS CLEAR IN THE OPINION BELOW

In 1983 there was established a conclusive presumption to be applied in certain direct review cases to address the problem presented by ambiguous state court decisions in applying the independent and adequate state ground doctrine. *Michigan v. Long,* 463 U.S. 1032, 103 S.Ct. 3469 (1983).

> [W]hen,...,a state court decision fairly appears to rest primarily on federal law, or to be interwoven with the federal law, and when the adequacy and independence of any possible state law ground is not clear from the face of the opinion, we will accept as the most reasonable explanation that the state court decided the way it did because it believed the federal law required it to do so. *Id.*, at 1041, 103 S.Ct. at 3476.

The *Long* presumption has been more recently reiterated. *Caldwell v. Mississippi,* 472 U.S. 320, 105 S.Ct. 2633 (1985).

There are, then, two requirements that must be met to trigger the *Long* presumption and invoke the jurisdiction of

the Supreme Court. First, the state court decision must "rest primarily" on or be "interwoven with" federal law. Second, the adequacy and independence of "any possible state law ground" must be unclear from the face of the opinion. *Id.*

In this case, the first requirement is not met. The decision of the Supreme Court, Appellate Division, Third Department neither rests upon nor is interwoven with federal law.

At issue is whether a wrongful death cause of action asserted on behalf of a stillborn fetus was properly dismissed in a state court. The parties agree that the law of New York is absolutely consistent. No wrongful death cause of action exists on behalf of a stillborn fetus. *See Endresz v. Friedberg*, *supra*, at 482-87; *Tebbutt v. Virostek*, 65 NY2d 931, 933 (1985); *Raymond v. Bartsch*, 84 AD2d 60 (3d Dept. 1981), *lv denied* 56 NY2d 508 (1982). The Appellate Division, Third Department affirmed the lower court decision without any reliance on or reference to federal law:

> [w]hile plaintiffs raise several interesting arguments in support of their claim that the law should be changed, this court has stated before that reconsideration of the law established in *Endresz v. Friedberg*, (*supra*) 'must be addressed to the Legislature or the Court of Appeals' (*Raymond v. Bartsch*, *supra*). Accordingly, we cannot conclude that the wrongful death cause of action was inappropriately dismissed (*See*, *Indilicato v. Bellevue Maternity Hosp.*, 108 AD2d 997 [3d Dept. 1985]).

Further, the decision of the Appellate Division was not "interwoven" with federal law. *Long*, *supra*, 463 U.S. at 1041, 103 S.Ct. at 3476. Unequivocally, the decision of the Third Department is neither formulary nor obfuscatory in its

rationale. *Compare, Ylst v. Nunnemaker,* 111 S.Ct. 2590, 2594 (1991) (the problem faced by the Supreme Court in applying the independent and adequate state ground doctrine arises when attribution of the reason underlying the decision of the court below is difficult and artificial).

The decision affirming the denial of a right of recovery under New York's wrongful death statute by the personal representative of a stillborn fetus which dies as a result of injuries sustained while *en ventre sa mere* is based upon a long line of state precedent construing New York's wrongful death statute to reject similar claims. *See Endresz v. Friedberg, supra*; *Indilicato v. Bellevue Maternity Hospital, supra*; *Raymond v. Bartsch, supra*. None of those decisions either rest squarely on federal law or make mention of federal law. Thus, there is no issue of federal law implicated in New York's interpretation of its wrongful death statute to be inferred from EPTL § 5-4.1 or the case law construing the statute.

A STILLBORN FETUS DOES NOT HAVE THE LEGAL PERSONALITY NECESSARY TO CHALLENGE NEW YORK'S WRONGFUL DEATH STATUTE

Petitioners fail to address the independent and adequate state ground doctrine in the argument contained in their Petition. Instead, they argue that the Supreme Court has jurisdiction over this case because "[t]he *Endresz* and *Tebbutt* cases are constitutionally wrong". This is so, Petitioners argue, because the United States Supreme Court has declared that a woman's right to terminate an unwanted pregnancy "only exists in pre-viability cases."

Petitioners fail to grasp the import of *Roe v. Wade*, 410 U.S. 113 (1973) and its progeny. It has been clearly established only that the state may not interfere with a woman's right to terminate her pregnancy before the fetus has attained viability. *Id.*, 410 U.S. at 163. In a recent partial reaffirmation of the *Roe* case, the Supreme Court was careful to neither confer nor require legal personality for fetuses that are deemed viable. "[S]ubsequent to viability, the state in promoting its interest in the potentiality of human life may, *if it chooses*, regulate, and even proscribe abortion except where necessary in appropriate medical judgment, for the preservation of the life of the mother." *Planned Parenthood v. Casey*, 112 S.Ct. 2791, 2821 (1992) (*citing Roe v. Wade*, 410 U.S. 113, 164) (emphasis supplied); *See also Ryan v. Beth Israel Hospital*, 96 Misc.2d 816, 409 N.Y.S.2d 681 (1978).

It should be further noted that in nearly every instance in the United States Constitution the use of the word "person" has not included stillborn infants. *Roe v. Wade*, *supra*, 410 U.S. at 158. Moreover, the Supreme Court has unequivocally ruled that the word "person", as used in the Fourteenth Amendment, does not include the unborn. *Roe v. Wade, supra*, 410 U.S. at 158; *Keith v. Daley*, 764 F.2d 1265 (7th Cir. 1985), *cert. denied Illinois Pro-Life Coalition, Inc. v. Keith*, 474 U.S. 980 (1985).

Federal law compels no decision on the question of whether to allow a cause of action under New York's wrongful death statute by the personal representative of a stillborn fetus. There can be, then, no issue of federal law germane to the resolution of this question. The decision properly lies with the New York Legislature and Court of Appeals. *See Endresz v. Friedberg*, 24 NY2d 478; EPTL § 5-4.1.

The New York Court of Appeals has addressed the question of whether Petitioners appeal directly involves any constitutional issues. In earlier proceedings in this action, Petitioners sought an appeal as of right to the Court of Appeals of New York pursuant to CPLR § 5601(b)(1). Such appeals will be allowed only from an order of the Appellate Division which finally determines an action where there is directly involved a substantial constitutional (New York or federal) question. *Hartnett v. Ballston Spa*, 75 NY2d 863 (1990); *Fine v. City of New York*, 75 NY2d 863 (1990).

In cases where the decision of the Appellate Division was or may have been based on grounds not involving constitutional construction, no appeal as of right will lie pursuant to CPLR § 5601(b)(1). In one such case involving statutory construction issues and claims argued to be rooted in federal law New York's highest court wrote "[t]he core of the Appellate Division decision was its construction of the pertinent statutes. While the Court went on to find the Supreme Court's order . . . would contravene the Establishment Clause . . . [t]he constitutional discussion . . . appears to have been incidental to the Appellate Division holding." *Bd. of Education v. Weider*, 72 NY2d 174, 182-83 (*citing Matter of Haydorn v. Carroll*, 225 NY 84 [1918]). In their decision dated September 14, 1993 denying Petitioners' appeal as of right, the Court of Appeals based its decision "upon the ground that no substantial constitutional question is directly involved." (Petitioner's Appendix, 4)

THERE IS NO BASIS TO DISTURB THE EDIFICE OF NEW YORK PRECEDENT REFUSING TO ALLOW THE PERSONAL REPRESENTATIVE OF A STILLBORN FETUS A CAUSE OF ACTION FOR WRONGFUL DEATH

This issue sought to be addressed by Petitioners is clearly one of statutory construction. The wrongful death cause of action was legislatively created in 1847. *Gonzales v. New York Housing Authority*, 77 NY2d 663 (1991). In 1969, the seminal case, *Endresz v. Friedberg*, *supra*, was decided. The *Endresz* court traced the legislative and judicial history of New York's wrongful death statute. Their review failed to disclose any precedent to extend a wrongful death cause of action to the personal representative(s) of a stillborn fetus. The cases since *Endresz* have echoed its pronouncement. *See Byrn v. NYC Health and Hospitals Corporation*, 31 NY2d 194 (1972); *Tebbut v. Virostek*, 65 NY2d 931 (1985); *Raymond v. Bartsch*, *supra*; *Indilicato v. Bellevue Maternity Hospital*, *supra*.

In affirming the dismissal of Petitioners' wrongful death cause of action on behalf of the stillborn fetus, the Appellate Division, Third Department, relied on two of its prior decisions, *Indilicato v. Bellevue Maternity Hospital*, 108 A.D.2d 997 and *Raymond v. Bartsch*, 84 A.D.2d 60. In the *Indilicato* case, the Third Department affirmed the dismissal of a wrongful death cause of action for the wrongful death of an unborn child, citing *Endresz v. Friedberg*, 24 N.Y.2d 478. Four years prior, in the *Raymond v. Bartsch* case, the Third Department dismissed a similar cause of action for the wrongful death of an unborn child, again invoking the *Endresz* case. Justice Casey noted that "reconsideration of the

rule set forth in *Endresz* must be addressed to the Legislature or the Court of Appeals." *Raymond v. Bartsch, supra.*

The wrongful death statute and the *Endresz* decision remain consistent with the view that permeates the statutory and common law of New York. Legal personality is conferred at live birth.

For example, at common law the destruction of an unquickened fetus was not considered manslaughter. *Evans v. People*, 49 N.Y. 86 (1872). Further, a pregnant female who was sentenced to death would be executed unless the fetus had quickened. *See Byrn v. N.Y.C. Health and Hospitals Corp.*, 38 AD2d 316, 330 (2d Dept. 1972).

In addition, a criminal defendant cannot be charged with homicide in the death of an unborn fetus. This is so because the New York Legislature has excluded the unborn from the definition of "person" pertinent to homicide: "a human being who has been and is alive." Penal Law § 125.05(1); *See also People v. Hall*, 158 A.D.2d 69 (1st Dept. 1990).

Similarly, a woman consenting to a justifiable abortion cannot be a principal or an accomplice in the death of the fetus because the New York Legislature has not vested the fetus with legal personality. Were such legal personality conferred, criminal responsibility would, arguably, have to attach. Penal Law § 125.05 (1), (3); *See also Roe v. Wade*, 410 U.S. 113, 158 n.54 (1973).

The Court of Appeals has held that an unborn fetus is not a person beneficially interested in a trust such that their

consent need be obtained for revocation of that trust. *Matter of Peabody*, 5 N.Y.2d 541 (1959). The Court noted therein that an unborn fetus was not vested with legal personality until it was born alive. *Id.* at 547.

In general, the Court of Appeals has confirmed that it owes deference to consistent legislative determinations. In the absence of "a constitutional question, even the State's highest court may not refuse . . . to apply the plain import of an applicable statute, which, until and unless amended or repealed, must be respected as the law for all our people, no matter where positioned." *People v. Mackell*, 40 N.Y.2d 59, 64 (1976). Here the "plain import" of the applicable statute, particularly in view of the concurring legislative determinations in other areas of New York law, is that legal personality will be conferred, for purposes of maintaining a wrongful death cause of action, at live birth, not at viability. Should any reevaluation of New York's wrongful death statute need be undertaken, it is a task for the legislative branch of government. "[T]he perception and declaration of relevant public policy are best and most appropriately explored and resolved by the legislative branch of our government." *Murphy v. American Home Products Corporation*, 58 N.Y.2d 293 (1983).

It should be noted that precedents involving statutory interpretation are entitled to great stability. "After all, in such cases, courts are interpreting legislative intention and a sequential contradiction is a grossly arrogated legislative power. Moreover, if the precedent or precedents have 'misinterpreted' the legislative intention, the Legislature's competency to correct the misinterpretation is readily at hand." *People v. Hobson*, 39 N.Y.2d 479 (1976) (citing *Matter of Schinasi*, 277 N.Y. 252, 265-66 [1938]).

The doctrine of *stare decisis* "provides that once a court has decided a legal issue, subsequent appeals presenting similar facts should be decided in conformity with the earlier decision." *People v. Bing*, 76 N.Y.2d 331 (1990). As interpreted by the Court of Appeals, *stare decisis* militates strongly in favor of adhering to the legislative determination and judicial precedent in New York which do not extend the wrongful death cause of action to the personal representative(s) of the alleged estate of a stillborn fetus. This approach to *stare decisis* taken by the Court of Appeals recognizes goals of "efficiency, predictability, and uniformity." Wachtler, *Stare Decisis and a Changing New York Court of Appeals*, 59 St. John's Law Review 445, 446 (1985).

In this case, to allow a wrongful death action to be brought on behalf of a stillborn fetus would be to confer legal personality at a point in time prior to live birth. Such a change would be a radical departure from precedent as well as from the scheme of the statutory and common law in New York. Any such change would have far reaching implications and should only be undertaken by the legislature.

Simply put, the legislative purpose of New York's wrongful death statute has not been frustrated by case law interpreting the statute. Federal law does not require any departure from New York's longstanding refusal to permit the personal representative of a stillborn fetus to sue for wrongful death. The state court decision is not, therefore, based on federal law. It has as its rationale and independent and adequate state grounds.

CONCLUSION

For the foregoing reasons, it is respectfully requested that certiorari be denied the Petitioners.

Respectfully submitted,

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